Rothe Development Corp. vs U.S. Department of Defense

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Rothe Development Inc.

- US Court of Appeals for Western District of Texas issued a decision on Rothe Development Corporation vs. DoD and the Department of Air Force case on 4 Nov 2008
  - Decision on constitutionality of 10 U.S.C 2323

10 U.S.C. 2323

- 10 U.S.C. 2323 Contract Goal for SDBs and Certain Institutions of Higher Education
  - Prescribes goal of 5% of total amount obligated for contracts and subcontracts for socially and economically disadvantaged businesses (SDBs), HBCUs, MIs, Hispanic Serving Institutes, Native Hawaiian Institutes, and Alaska Native-serving Institutes
  - Includes provisions for subcontracts
  - Provides for technical assistance, and infrastructure assistance for colleges and institutions listed above

10 U.S.C. 2323 Con't

- Allows advance payments to SDBs
- Allows less than full & open competition – with 10% price evaluation factor for SDBs (including 8(a)'s) if agency has not reached 5% goal
  - Note: DoD has met 5% goal since 1998 – thus the evaluation factor not used since that time.
- A requirement that one factor in contracting officer's performance evaluation be the ability of the officer to increase contracts awards to SDBs

CALL TO DUTY
BOOTS ON THE GROUND

10 U.S.C. 2323 Con't

- Requirements for participating in program:
  - Must be economically disadvantaged: net worth < $750 with certain exclusions
  - Must be socially disadvantaged: members of certain groups: Black Americans, Hispanic Americans, Native Americans, Asian pacific Americans, etc.
  - Can be classified as socially disadvantaged if preponderance of evidence presented indicates clear and convincing evidence
- The statute was first enacted in 1986 for three years, and extended it 1989, 1992, 1999, 2002 and 2006. It is due to expire at the end of 2009.

10 U.S.C. 2323 Con't

- The head of the Defense Department shall establish a specific goal for the award of prime contracts and subcontracts to historically Black colleges and universities, Minority institutions and Hispanic serving institutions in order to increase the participation of such colleges and universities in DoD programs for research, development, test and evaluation.

- To attain the goal the head of the agency shall provide technical assistance and infrastructure assistance to HBCUs, HSIs and minority institutions.

- Technical assistance shall include information about the program, advice about agency procurement procedures, instruction in the preparation of proposals and other appropriate assistance.

10 U.S.C. 2323 Con't

- Infrastructure assistance may include programs that do the following:

- Establish and enhance undergraduate, graduate and doctoral programs in scientific disciplines critical to the national security functions of the Department of Defense.

- Make DoD personnel available to advise and assist faculty at such colleges in the performance of defense research.

- Establish partnerships between defense laboratories for the purpose of training students in scientific disciplines.

- Award scholarships, fellowships and coop work education programs in scientific disciplines.

10 U.S.C. 2323 Con't

- Attract and retain faculty involved in scientific disciplines.
- Equip and renovate laboratories for the performance of defense research.
- Expand and equip ROTC activities to strengthen scientific disciplines .*
- Provide other assistance as the Secretary determines appropriate to strengthen scientific disciplines critical to the national security functions of the DoD or critical to the college infrastructure to support the performance of defense research

*Other statutory authority exists for ROTC

Rothe Development Corp Case

- Background:
  - In 1990, AF awarded contract for computer services for Columbus AFB to Asian American owned business - International Computer and Telecommunications ($5.75M) using the 10%Price Evaluation Adjustment Factor of 10 USC 2323
  - Rothe was lowest bidder ($5.57M)
  - Rothe filed suit in 1998. Rothe claimed that the application of 10 USC 2323 was unconstitutional under the Equal Protection of the Fifth Amendment

CALL TO DUTY
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Fifth Amendment - "Equal Protection Under the Law"

- *"No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."*

CALL TO DUTY
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Equal Protection Under the 5th Amendment

Supreme Court uses three tiered approach to analyze applicability of 5th Amendment's Equal protection clause:

- STRICT SCRUTINY (The government must show that the challenged classification serves a compelling state interest and be narrowly tailored to further that interest):
  - Suspect Classifications
    1. Race
    2. National Origin
    3. Religion
    4. Alienage
  - Classifications Burdening Fundamental Rights
    1. Denial or Dilution of the Vote
    2. Interstate Migration
    3. Access to the Courts
    4. Other Rights Recognized as Fundamental

Equal Protection Under the 5th Amendment

- MIDDLE-TIER SCRUTINY (The Government must show that the challenged classification serves an important state interest and that the classification is at least substantially related to serving that interest):

Quasi-Suspect Classification

- 1. Gender
2. Illegitimacy

- MINIMUM (OR RATIONAL BASIS) SCRUTINY (The government need only show that the challenged classification is rationally related to serving a legitimate state interest.)

"Narrow Tailoring"

- For race-conscious actions, "narrow tailoring" analysis must include:
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  - Necessity of relief
  - Efficacy of alternative race neutral remedies including waiver provisions
  - Relationship of stated numerical goals to relevant labor market
  - Impact on the rights of third parties
  - Over inclusiveness or under inclusiveness of racial classification.

CALL TO DUTY
BOOTS ON THE GROUND

Rothe Decision

- Federal Appeals Court ruled that Congress did not meet the narrow tailoring analysis required for the strict scrutiny test when it extended the statute in 2006.

- There was no evidence (based on statistical evidence provided to Congress in 2006) that DoD participated as a passive participant in pervasive nation wide racial discrimination.

- 10 USC 2323, as enacted in 2006 is unconstitutional and prohibits application of the current statute.

- 26 Feb 2009, Court entered a final judgment granting Rothe's request for complete injunction of the application of 10 USC 2323 .

Rothe Decision

- As a result of this ruling, DoD may no longer
  - limit competitions to SDBs, Historically Black Colleges and Universities and minority institutions or
  - apply a price preference favoring such entities.

- The other Small Disadvantaged Business programs including 8(a) and HUBZones, are not adversely impacted by this decision.
  - These programs, and any preferences granted there under, are separately authorized under the Small Business Act.

DoD Guidance

"Effective 26 Feb 09, any activity, which includes but is not limited to the award of contracts and orders under contracts, advance payments, and the award of grants or scholarships or the addition of funds to existing grants and scholarships, that rely exclusively on the authority of 10 U.S.C. § 2323 should cease. "

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